



DELIVERING STRATEGIC SOLUTIONS ACCA'S 2000 ANNUAL MEETING

How to Keep Your CEO Out of Jail:

Lessons Learned from U.S. v. Jackson and Peters and Other Recent Criminal Environmental Cases

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How to Keep Your CEO Out of Jail-- Lessons Learned from Recent Prosecutions

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I. Three Significant Recent Cases

- US v. Peters & Jackson (ED Tex)
- US v. BPXA (D Alaska)
- US v. Royal Caribbean (D Puerto Rico, et al.)

I. Different Handling--Different Results

- PETERS & JACKSON--No voluntary disclosure but personal open approach by CEO + cooperation
 - No company criminal sanction
 - Individuals charged, tried and convicted
- BPXA--Voluntary disclosure + cooperation, with governmental demand for more cooperation
 - Company plea to one felony CERCLA disclosure count
 - Contractor and contractor employee pleas
 - Company individuals investigated but not charged

- ROYAL CARIBBEAN--Hostility toward government
 - Company indicted in several districts and ultimately pled to many counts and paid substantial fines (more than \$27 MM).
 - Company ultimately had to agree to cooperate with the Government; one of the Company's employees has been charged with criminal violations.

II. US v. Peters & Jackson

A. The Company cooperated with the government and was not prosecuted.

1. This was not a voluntary disclosure case.
2. The CEO of the Company invited the USA to inspect--facility doors were opened for two weeks.
3. Other cited factors: Problems did not start on Company's watch; Company had good environmental program, etc.

A. Case against corporate managers--plant manager/environmental manager

B. What was the motivation for the prosecution of the individuals?

1. *Prosecution view:*

- a. Misinformation to the agency;
- b. Disregard of public interest in minimizing emissions.

1. *Defense view:*

- a. Vendetta against defendants; search for management fall guys; desire to make an example.
- b. Strong belief that neither defendant intended to violate the law.

A. A Short History

1. Initial agency interest
2. Initial charges
3. Final charges (5 counts):
 - a. Conspiracy (1 count)
 - b. False Statement (1 count)
- a. NESHAPs (3 counts re same tank)

A. Concerns:

1. *Defense view:* Government stretched to make a case:
 - a. False Statement: "1.4# to 11,000# per day" is a false statement?
 - b. 3 NESHAPs Violations: No need to prove intentional misconduct.
- a. Conspiracy: A lot of evidence of mistakes; almost no evidence of a concerted effort to purposely circumvent the law.
 2. Substantial use by the prosecution of e-mails and other "informal" means of

communicating.

3. Use of "draft" overheads to attempt to show that there was an effort to withhold key information.

F. Lessons learned:

1. If the government doesn't like you, it has enormous power to come after you if you are a manager with environmental responsibility.
2. Juries will tend to side with the government in environmental cases.
3. What you write--e-mails, rough drafts--may someday come back to haunt you.

IV. US v. BPXA

- A. Voluntary disclosure of illegal disposal of RCRA-regulated waste by a contractor at North Slope Company sites.
- B. CERCLA report of nine-month-old release made two weeks after information first came to Company.
- C. Company cooperated.

1. Turned all (well over 100) interview memoranda done in the early stages of the investigation over to the DOJ.
2. Gave open access to the DOJ to its key offices and its production and drilling facilities.
3. Made witnesses available upon request throughout the investigation.
4. Made records available upon request throughout the investigation.
5. Regularly briefed government on allegations against company employees that came to the company's attention.

- A. 4 1/2 year grand jury investigation.
- B. Dispute with DOJ arose over the extent of cooperation necessary under government policy in light of the EPA Criminal Program memorandum of October 1, 1977, that indicated that companies did not have to waive privilege in order to cooperate.
 1. Issue unclear under government guidance
 2. Resolved by prosecutors against the Company

- A. Ultimately, Company pled guilty to one count of failure to provide timely CERCLA release notification.
 1. No prosecution on, or deferral of, RCRA charges
 2. DOJ ultimately acknowledged BPXA cooperation

- A. Contractor and three contractor employees pled guilty to various charges.
- B. \$500,000 criminal fine against BPXA
- C. \$6.5 million civil penalty settlement between Company and U.S.
- D. Agreement to implement nationwide EMS (\$15 million cost)
- E. No Company employees prosecuted, although there was lengthy investigation
- F. Lessons Learned:

1. DOJ's view on "cooperation" is that cooperation means:

- a. waiver of the attorney work product protection and, under some circumstances, waiver of attorney-client privilege; and
- b. must:
 1. Disclose all facts
 2. Facilitate access to witnesses
 3. Provide access to documentary information
- a. The following kinds of documents will be requested:
 1. Reports of internal investigations
 2. Memoranda of interviews
 3. Notes of interviews
 4. Chronologies
 5. Witness lists
2. If voluntary disclosure is to be undertaken, there is real advantage to:
 - a. doing it early; and
 - b. knowing exactly how you will cooperate
3. If disclosure is made, take early action to protect individual employees.
 - a. Provide them with counsel.
 - b. Clarify the role of company counsel.
 - c. Communicate as effectively as possible with the employees and their counsel without joint defense agreements
 4. Make sure the following actions are taken in a timely manner:
 - a. Correct the violation as quickly as possible
 - b. Remediate any environmental harm caused
 - c. Modify management systems to:
 1. prevent future violations and
 2. improve environmental performance
 - a. Take appropriate disciplinary action, if necessary
5. Internal investigation in the context of voluntary disclosure:
 - a. Should be done to:
 1. determine what action, if any, Company should take to discipline employees;
 2. determine why infractions occurred;
 3. determine whether any similar infractions occurred or are continuing;
 4. prevent reoccurrence.
 - a. Should be done quickly and brought to a definitive conclusion.
 - b. Should be done in a limited fashion--do only what you need to do.

- c. Should focus on hard facts--not on opinion or speculation.
- d. Memoranda of interviews should be crisp and concise.

6. Investigation in the context of voluntary disclosure:

- a. Essential to provide all interviewees with a "corporate Miranda" warning.
 - 1. Advise that the lawyer doing the interview represents the company and does not represent the employee.
 - 2. Advise that the witness has the right to speak to his/her own lawyer if he or she wants.
 - 3) Explain that the company may direct company counsel to share with the government what it learns in the interview.
- b. Do not enter into any joint defense agreements in order to interview witnesses.
- c. Make sure ahead of time that your lead interviewers are trained and experienced.
- d. When you have acquired the information you need to make disciplinary decisions, do not investigate further; leave that to the government.
- e. Provide the fruits of the investigation to the government in a timely manner.
- f. For each interview, prepare a single interview memorandum and discard all drafts.

V. US v. Royal Caribbean

- A. Investigation initiated by the Coast Guard into discharges from ships allegedly in violation of the Clean Water Act.
 - 1. Ship sighted discharging oily water into sea.
 - 2. Major grand jury investigation ensued involving numerous coastal districts.
 - 3. A large range of company waste handling practices were scrutinized.
- A. In the initial case, the company lost its motions to dismiss and was faced with several options:
 - 1. plead guilty to the indictment;
 - 2. go to trial and face almost certain conviction;
 - 3. work out an agreement with the government to cooperate in the remaining investigation in exchange for leniency.
- A. Company decided to plead to the first two indictments (P.R. & Fla.) instead of agree to cooperate
 - o Sentence: \$8 MM fine plus \$1 MM to environmental project, plus must implement a government-approved compliance program
- A. Company was then indicted in six cities and pled.
 - 1. Sentence: \$18 MM fine plus full cooperation in investigation against individuals.
 - 2. Cooperation requirement quite onerous--e.g., special master must review all disclosures.
- E. At least one Company executive has been charged since the Company's last sentence was entered.
- F. Lessons Learned:

1. If the government has a sound case against a Company, the Company will pay a substantial price not to plea bargain and cooperate.
2. On the other hand, the cost of cooperation--in terms of the conditions that will be imposed--will be high.

IV. Lessons learned from all three cases:

- A. For a Company, there is an advantage to voluntary disclosure if you know what you are getting into.
- B. Although voluntary disclosure will be expensive and probably time- and resource-consuming, it is an effective means of mitigating the impact of potential criminal charges against the Company (and probably its senior executives who establish the voluntary disclosure policy for the Company).
- C. If you are in the midst of a grand jury investigation, it is virtually impossible to make it go away.
 1. Political intervention is ill-advised.
 2. Elevation prospects are normally slim, but important to consider.
 3. The investigation will move on "government time."

A. Juries:

1. Are not likely to be sympathetic to environmental defendants--and particularly company managers.
2. Have a difficult time dealing with technical issues.
3. Have a difficult time dealing with sophisticated legal concepts.

- E.g., "conspiracy" or technical defenses based upon arcane regulatory provisions.

E. The Government says that it is only interested in cases where people/companies engaged in intentionally misleading/false/unlawful behavior.

- Nevertheless, general intent crimes give the government a big advantage in environmental cases.

IV. How do you avoid prosecution?

- A. Implement company programs consistent with government policies and guidelines. As long as these programs are implemented comprehensively and in good faith, their establishment and implementation will tend to provide protection for senior executives of the company.

1. Environmental Auditing (internal and external)
2. Environmental Management Systems

3. Voluntary Disclosure of Violations

- A. Communicate accurately and often with regulatory authorities regarding emerging environmental issues.

1. Do not let issues fester.
2. Describe facts fully and accurately.

3. Document communications accurately.

4. Assume what you write will be seen by an investigator

- A. Implement a comprehensive document retention program.

1. Ensure required retention periods for regulatory documents are being observed.
 2. Identify appropriate retention periods and implement a program to eliminate unnecessary records.

A. Educate all employees:

1. On the importance of creating and maintaining full and accurate records of the basis for all environmental actions taken.
2. On the importance of following document retention program procedures--in terms of keeping and destroying documents per the requirements of the program.
 3. On the importance of being careful what they write in e-mails and memoranda.

E. With regard to those employees/managers who work directly on environmental issues,

1. educate them on the law and
2. on the importance of management systems.

A. Analyze State and Federal Records

1. Unresolved issues evident in records?
2. Resolve those issues.

A. Conduct Periodic Legal Reviews

1. Do not let any audit issues remain open for an inappropriate period.
2. Identify and close issues involving regulatory interpretations.

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